Supreme Court of the United States.

O. B. & O. S. LATHAM,
Appellants,
vs.
THE UNITED STATES.
No. ~~20~~ 20

Brief for Appellants.

This is an appeal from the judgment of the Court of Claims, dismissing the petition of the appellants.

THE CASE.

In the year 1855, the claimants contracted with the Treasury Department to build a custom house at Buffalo, New York, and in 1856, they further contracted to build a custom house at Oswego, New York. The terms of the two contracts were in all essential particulars, identical. Rec. pp. 4–6

By these contracts, the claimants covenanted "to furnish and deliver all the material, and perform all the work required to construct and complete the buildings to be erected at Buffalo, N. Y., (or Oswego), agreeably to the original drawings and specifications, under the direction of the superintendent appointed by the Secretary of the Treasury for that purpose, and in conformity to the lithographed copies of the drawings of the several parts thereof numbered one, two, three, four, five, six, seven, eight and nine; and the printed specifications. according to the general conditions appended thereto, prepared at the office of the construction of buildings under the Treasury Department, and dated May 14, 1855, a copy of which is hereunto attached, which together with the drawings aforesaid, are made part of this contract, equally binding as if more particularly incorporated therewith, the whole subject to such omissions, additions and alterations as

may be determined upon by the said party of the first, part as provided for by the "general conditions" of the specifications appended thereto, hereto annexed." Rec. p. 5, fol. 6 and p. 6, fol. 8.

The "general conditions" were as follows:

"All the work must be done in the best and most workmanlike manner, of proper and appropriate materials, according to the plans hereinafter cited and the aforegoing specifications; and everything necessary to the proper and complete execution of said plans must be done and finished, whether the same may have been specified or not; and all such necessary work or materials which may not have been set forth in these specifications, must be done, and material furnished in a manner corresponding with the rest of the work, as well and as faithfully, as though the same were herein particularly described and provided for.

Every part of the building must be executed under the supervision of the aforementioned superintendent, and be subject to his entire approval: and in case any omissions, additions, or alterations of the plans may be required by the Treasury Department, during the progress of the work, the same shall be acceded to by the contractor or contractors and carried into effect, without in any way violating or vitiating any contract which may have been made for work or material, and all such omissions, additions or alterations shall be estimated for and the value thereof agreed upon and approved by the Department, and be added to or deducted from the contract by endorsement upon its back, as the case may be, before going into execution; or no allowance will be made for them by either party." Rec. p. 41-54

And the Secretary of the Treasury agreed to pay "*the sum of* $81,345, *good and lawful money of the coin of the United States* * * * *in consideration of the above premises.*" Rec., p. 4.

The same terms precisely are contained in the Oswego contract, the amount being $77,255. Rec., p. 6.

In the course of the construction of the buildings, many

additions, alterations, &c., under this contract, were required by the Treasury Department and made by the contractors; in some cases the value was agreed on and endorsed on the contract, and payment therefor made, but in others of said cases, the officer of the United States contended that their requirements were not "alterations or additions," and consequently refused to make any allowance therefor. Rec., p. 10; Certificate, par. 4.

To recover compensation for the value of said alterations and additions, the appellants brought suit in the Court of Claims in the year 1859. The petition contained some other items of charge, which were rejected by the court; and the court on the 5th of May, 1862, made a decision in favor of the petitioners, for the sum of $36,440 94, and in accordance with the then existing law, (it being before the reorganization of the court), reported to Congress a bill directing the said sum to be paid them for said work; and Congress, on the 3d of March, 1863, passed an act requiring the Secretary of the Treasury to pay to the petitioners, out of the moneys heretofore appropriated and remaining unexpended for the erection and enlargement of the custom houses at Buffalo and Oswego, in the State of New York, the sum of $74,583 37, in full of their claim for moneys due them for the erection and enlargement of said buildings, and of all claims of whatever nature, by them, for work and materials bestowed on said buildings, and connected therewith. Rec., p. 8.

By sundry acts passed prior to 1859, Congress had appropriated $ for the erection and enlargement of the custom houses at Buffalo and Oswego, and of these appropriations, the sum of $85,107 77 remained unexpended when the act for the relief of these appellants was passed. Rec., p. 11.

The appellants, under the said last mentioned act demanded from the Treasury, payment in coin which was refused, and payment was tendered in Treasury notes; these the appellants refused to receive as in full satisfaction of their demand, and gave notice to the Secretary of the Treasury by written protest, on the 6th of March, 1863, that they would receive

the same, reserving their right to claim money equal to coin, and the Secretary of the Treasury, on the 9th of March, 1863, paid the said amount in notes notwithstanding said protest. Rec., pp. 9, 11.

The notes so paid to the appellants were at the time of said payment worth in coin $47,054 74, being $37,529 03 less than the amount directed to be paid by the act. Rec., p. 11. These appellants brought suit in the Court of Claims to recover this balance, and the court ruled in substance:

1. That the covenants in the contracts to pay in coin did not apply to work done under the cluase requiring the contractors *to accede to and carry into effect any alterations and additions determined upon by the Secretary of the Treasury.*

2. That even if it did so apply, the Treasury notes, which were paid to the contractors, were a legal tender, and payment to their nominal amount. Rec. pp. 11, 12.

Points.

The covenant to pay coin applied to the work required by the Secretary in accordance with the general conditions, after the execution of the contracts, as well as to that described in advance by the specifications.

The rule that the contract shall govern, so far as it can be traced, applies to both parties and to all the stipulations. And it was ruled in the first suit, by the Court of Claims.

In this case the first part of the contract binds the contractors to do the work described in the printed stipulations, and also such other work as the Secretary shall require. The subsequent clause provides payment of a fixed sum in coin "*in consideration of the premises*," *i. e.*, of the undertaking to do as well the after required work as that specified in advance. There is no stipulation in the contract other than that here cited, to make any payment, and unless this be construed to extend to all work done, the contractors must have undertaken to do whatever was required for a fixed sum. And if for this work payment was promised, it was promised in coin.

2. *It is submitted, without conceding that the Treasury notes were a legal tender for debts contracted after the passage of the act authorizing their issue, that they were not such for pre-existing debts.*

The construction given the act by the Court of Claims defeats rights acquired by the appellants before its passage, and enables the appellees to discharge their liability in a manner expressly covenanted against. In fact it goes further and declares that the Government is never bound to pay at all, for if a debt may be extinguished by a promise to pay, and that promise in turn becomes a debt and is satisfied by another promise, the matter proceeds *ad infinitum*.

"A retrospective statute affecting and changing vested rights is very generally considered in this country as founded on unconstitutional principles, and consequently inoperative and void." 1 Kent Com., 455, and authorities there cited, particularly Wilkinson *vs.* Leland, 1 Pet., 627, 656–8.

Upon this point, whether the act of February, 1862, be constitutional we refor to a separate brief filed in this cause.

CARLISLE & McPHERSON,
for Appellants.

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BRIEF FOR THE APPELLEE.

Introductory statement.

The petition presented to the Court of Claims sets forth two several contracts, wherein, for the construction of a custom-house at Buffalo, and another at Oswego, N. Y., the United States in 1855 and 1856 agreed to pay claimants certain sums, ($81,345 and $77,255,) "good and lawful money of the coin of the United States," (pp. 4 & 7;) that claimants fulfilled these contracts; and, it appears, were *paid in full the above sums* named therein. That over and above that which was to be paid for by those stipulated sums, they furnished other materials, and did other work, for which they have not been fully paid, except as afterwards stated.

That in 1859 Congress had made appropriations amounting to $131,000, for the enlargement and completion of these custom-houses.

The appeal shows that claimants sought to obtain payment of the sum due to them by petition in the Court of Claims; and on May 5, 1862, that court made a decision in their favor, finding due to them the sum of $36,440 94; and thereafter reported the same to Congress with a bill for their relief.

That Congress (March 3, 1863) passed an act directing the payment to the claimants, out of moneys heretofore appropriated and remaining unexpended for the erection and enlargement of the custom-houses at Buffalo and Oswego, the sum of $74,583 37, in full of their claims for moneys due them for the erection and enlargement of said

buildings, &c.; that on March 3, and until March 9, 1863, there remained in the Treasury of said appropriations $85,107 77.

On March 6, 1863, claimants demanded of the Secretary of the Treasury payment of said $74,583 37 in coin; the Secretary refused to pay in coin, and claimants refused to receive Treasury notes, except under protest; the Secretary paid that sum in Treasury notes, notwithstanding said protest, on March 9, 1863, when coin to the amount of $74,583 37 was worth in Treasury notes, as they allege, $121,214 63. Thereupon claimants brought suit in the Court of Claims for the alleged difference between the amount of Treasury notes paid and that which should have been paid to be the equivalent of the amount ordered to be paid considered as coin, to wit, $47,231 37, and interest from March 9, 1863.

The Court of Claims ruled:

1 and 2. That the amount found due in their decision of May 5, 1869, was not due under the express contracts to pay "lawful money of the coin of the United States," but under implied contracts.

3. Same of sum directed to be paid under act of Congress.

4. That the United States notes, so offered to and received by the claimants, were a legal tender in payment of any debt due under the special contracts set forth in the petition, &c.

Brief.

PART 1. APART FROM THE CONSTITUTIONAL QUESTION.

(A.) As though the original contracts were still in force.

1. *Not under the express contracts*

I. There was no error in the ruling of the court as set forth in the first, second and third specifications of the appellants. The money found due and ordered to be paid became due, not under express, but under implied contracts. The case does not deny the payment of the full sums mentioned in, or endorsed on, the special contracts.

II. Beyond those sums the contracts were to pay merely *lawful money*. Whatever contract there may have been to pay in a particular kind, whether of money or commodity, the same cannot be extended by implication, beyond the amount of that kind so agreed to be paid. When the law implies an agreement to pay, it implies an agreement to pay *lawful money*, nothing else. Parsons on Contracts 1, 556, 2, 515; Cook *vs.* Jennings 7 D and E Term, 381 Shollenberger *vs.* Brinton, 52 Penn. State, 95.

2. *If the case were under the express contracts.*

III. A contract to pay *money* is fulfilled by the payment of whatever is lawfully current as money at the time of payment; even if the contract call for money of a particular kind.

Latch's Cases, 84, Ward v. Ridgwin; Bacon's Abr. Tender, &c., B. 2, p. 317; Wood v. Bullens, 6 Allen, 516; Hastings v. Johnson, 2 Nevada, 190; Buchegger v. Shultz, 13 Mich., 420; Henderson v. McPike, 35 Mo., 259; Bodes v. Bronson, 34 N. Y.; Shollenberger v.

Brinton, and other cases, 52 Penn., 41 and 83 and 105; 16 Iowa, 243; 38 Mo., 458, 194, 138; Higgins v. Bear River, &c., 27 Cal., 153; Downman v. Downman's, Exrs., 1 Wash., Va., 29, where the principle was applied to the disadvantage of the debtor.

The governing principle was recognized in the case of Mixed Money. Davies' Reports, (Irish,) 48.

IV. These contracts are to be construed as calling only for "lawful money of the United States." The Secretary of the Treasury as agent of the United States had no authority to bind his principal other than to the payment of that which might be lawful money at the time of payment.

This contract was not authorized by Sec. 19, of the act of Aug. 6, 1846, upon which it probably rests.

In support of this point, the brief of Mr. Solicitor Weed, and other arguments for the United States, in the case of Thomas W. Pierce *v.* U. S., now before the court, are cited.

V. The agent of the United States in this transaction was instructed by his principal to pay these notes as lawful money, at their value as fixed by law, in full payment of the sum due the appellants, and not otherwise; and of these instructions, the appellants had notice. With this notice they received payment in such notes; and must be held to have received them as they were offered.

VI. The books show no case where the creditor, objecting to the kind of money offered, yet receiving it, is, thereafterwards, allowed to prove its depreciated value *somewhere in comparison with some other kind, even of money*, in maintenance of an action for the sum which such a calculation would show unpaid.

VII. In the view most favorable to this claim, the case is that of a creditor receiving *for and on acconnt of his credit* the negotiable promissory notes of his debtor, and thereafter bringing action for the original debt as still unpaid. To maintain his action he must show the debtor safe from all liability to pay the notes.

Kearslake *v.* Morgan, 5, D. and E. Term, 513; Griffith *v.* Owen, 13, Meeson & Welsby, 58; Price *v.* Price, 16, ib. 232; Mercer *v.* Cheese, 4, Man. & Gran, 804; Champion *et al. v.* Terry, 3 Brod. & Bing., 295; Davis, *v.* Dodd, 4 Taunt, 602; Dangerfield *v.* Wilby, 4 Esp., 159; Hawden *v.* Mendizabel, 10 Moore, 477; Kean *et al. v.* Dufresne, 3 S. & R. 233; Miller *v.* Lumsden, 16 Ill., 161; Holmes *v.* De Camp, 1 Johns, 34; Pintard *v.* Tackington, 10 Johns, 104.

VIII. If the claimants were in this form to present their case, their claim would be a petition to the Court of Claims, to compel the United States *to resume specie payments forthwith.*

To sustain such a case, it would be necessary to hold .that the United States stands on the same level with other debtors who may be sued in the judicial courts; that the Court of Claims has a jurisdiction over the United States corresponding to the jurisdiction of the common law courts over private debtors, such a jurisdiction as would authorize an action of assumpsit to be maintained in that court against the nation on every treasury note not pay according to its tenor.

buildings, &c.; that on March 3, and until March 9, 1863, there remained in the Treasury of said appropriations $85,107 77.

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The United States is not such a debtor, nor the Court of Claims such a court.

Sec. 1, Act of Feb'y 24, 1855, X Stat. at Large, p. 612.
" 7, " " Mar. 3, 1863, XII " " p. 766.

IX. This claim, however, far from fulfilling the above requirement of the common law in like cases between private persons, fall within the rule laid down in Alexander *vs.* Byers, (19 Ind., 301,) where the defendant was allowed to plead that the plaintiff to whom money, unauthorized though actually current, was paid, passed the same at par to other persons who returned the same to the defendant, and that the latter redeemed the same.

(B.) On the case as it is before the court:

I. The contracts set forth are not legally before this court. They have been once litigated and adjudged, and thus became "merged" in the judgment of the Court of Claims of May 5, 1862, and the act of Congress, based thereon, of March 3, 1863. Accordingly they are *res judicata.*

II. The only question now open to the claimants to litigate, is whether the Secretary of the Treasury paid what the act of March 3, 1863, for their relief, ordered to be paid to them.

III. The legal-tender act had then been passed, and gone into full effect, and such paper dollars as it had authorized were the only dollars then in actual use in the payment of debts, public and private, and in the transactions of trade and commerce. Such dollars alone were intended by the use of that word in the act of March 3, 1863, for the relief of the claimants.

IV. This question cannot be litigated before the Court of Claims in this proceeding. The remedy, if any, should have been sought by mandamus. The Court of Claims has no jurisdiction to enforce the execution of its own judgments, or of acts of Congress founded thereon.

Part II.—The Constitutional Question.

(C.) This Petition not a Money Demand.

The appellants in their petition seek to recover treasury notes, which they allege and argue are not lawful money of the United States. The prayer of their petition is, therefore, bad, if the tenor of their argument be good. The judgment of the Court of Claims must follow the law of the land, and be for the payment of lawful money, nothing else; (U. S. *v.* Alire ; 6 Wallace, 573;) The case of Mixed Money, Davies, (Irish,) 48; Wood *v.* Bullens, 6 Allen, 517; Hastings *v.* Johnson, 2 Nev., 190; Buchegger *v.* Shultz, 13 Mich., 420; Henderson *v.* McPike, 35 Mo., 259.

(D.) The Legal Tender Act Constitutional.

The treasury notes paid were lawful money, as the act of Congress of Feb. 25, 1862, authorizing their issue and making them legal tender, is constitutional, as will now be shown.

I. The power to determine what shall be legal tender is an essential attribute and inseparable incident of sovereignty. It is inevitable to the provision by government of any method for the forcible collection of debts, or performance of any contracts, or fulfilment of any remedies by the payment of money.

See Judge Denio's opinion, 27 New York Rep's. 525–7. History sustains this view. Grote's History of Greece in relation to Athens under Solon, Vol. 3, 121, 212; Practice of the American Colonies, 11 Peters, 333; 52 Penn. State Reps., 71; Bank of Gallipolis *v.* Donigan, 12 Ohio, 220; Mixed Money, Davies, (Irish,) 50.

II. This power has been an unlimited power, as also legislative power in other respects over the relation of debtor and creditor; and in our country, whether to be found in the state or national government, the presumption is that it will be found without limit.—Mixed Money, Davies, 50; 11 Peters, 333; Story on the Constitution, §1118, 1371–2; 3 and4 William, IV, ch. 98, sec. 6.

III. The constitutional clause last adopted (Art. I, sec. 10) may be first considered:

"No State" * * * shall make anything but gold and silver coin a tender in payment of debts."

This cannot be construed as equivalent to—

(*a*) "Nothing but gold and silver coin shall be made a tender in payment of debts;" thus restricting all legislative power over the subject.

1. The prohibition thus established would be useless as long as Congress has unlimited power to debase the coin. To make it effective it must be extended by other provisions, which would prevent changes in the currency, absolutely necessary. Statute of Feb. 21, 1853, vol. 10, p. 160.

2. It is not found in other constitutions. The example of England cited. Macleod on Banking, 2, 313.

3. That is not the meaning of the word; nor consistent with the place where the words are found; nor with the undisputed course of legislation. Act of Mar. 3, 1865, vol. 13, p. 518; and of May 16, 1866, vol. 14, p. 48.

(*b*) Nor as equivalent to: "There shall be no legislation upon the subject except by the States, which may merely regulate the value of gold and silver coin as tender."

1. The natural meaning of the words favors this construction; but it does not comport with the admitted purpose of the Constitution, nor with the practice of the government.

Effect upon act of Feb. 21, 1853, supposed. Could the tender of coins be, by State legislation, enlarged against the provisions of that act? No uniformity of currency possible if this construction prevailed.

2. It does not comport with the views of any courts participating in this discussion. Sometimes asserted at random, the same authorities more accurately deny and disprove it. 2. Duvall, 34, 5, 6, 7; 52 Penn. State Reps. 36, 7, 8. 27 N. Y., 529, 30, 540, 1.

(*c.*) It must, on the other hand, be admitted, that no restriction is

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(*c.*) It must, on the other hand, be admitted, that no restriction is

placed upon Congress by this provision. None can be found in the words or their place; and no established rule of interpretation will allow one to be inferred.

IV. An express grant to Congress is found in Art. I, sec. VIII, of power "To coin money and regulate the value thereof and of foreign coin."

(*a.*) "To regulate the value thereof" signifies to regulate its value for legal purposes, that is, as legal tender. Act of April 2, 1792.

(*b.*) The quality of legal tender is not a consequence of the act of coinage, as asserted in 2 Duvall, 20. The Constitution does not *of itself* make money lawfully coined legal tender. See the following statutes: April 2, 1792, sec. 16, Stat. at Large, vol. 1, 250; June 28, 1834, vol. 5, 137; Jan. 18, 1837, secs. 10, 11, vol. 5, 138; Feb. 21. 1853, sec. 2, vol. 10, 160, March 3, 1851, sec. 11, vol. 9, 591; Mar. 3, 1665, sec. 2, vol. 13, 537; May 16, 1866, sec. 3, vol. 14, 47.

These statutes show an unlimited discretion in Congress over the matter of legal tender.

(*c.*) The power of Congress is not confined to the coin of the United States. The further power "to regulate the value" "of foreign coin," authorizes Congress to adopt the coinage of any independent nation of the world, no matter of what metal such coinage may be composed.

Thus the Constitution plainly allows other material than gold or silver to be made legal tender; that is, in the exercise of the power "to regulate the value of foreign coin."

(*d.*) Moreover, the whole list of metals is open to the coining power also, as defined by Ch. J. Woodward of Penn. and the Court of Appeals in Kentucky. 52 Penn., 2 Duvall.

(*e.*) The restriction to metallic substances involved in these definitions is of no practical utility, but hurtful as a constitutional provision.

Upon these definitions, however, the argument against the constitutionality of the statute in question depends. The whole argument rests upon the word "coin," taken in its narrowest sense.

But the whole power of Congress over the subject of legal tender is not granted in the phrase "to coin money." In the authority to regulate the value of money, and from the undisputed practice of the government, has already been clearly shown the existence in Congress of an independent, substantive power over this subject.

Of such a power, actually existing limitations are not easily to be raised. (Fletcher *v.* Peck. 6 Cranch, 128.) The narrowest meaning of the word "coin" is not so absolute in authority as to create such a limitation; for, the expression "to coin money," in connection with the expression "to regulate the value of foreign coin," used in a constitution of government, must be taken in its widest sense. To

coin means to "fabricate," that is, to make. Coin means "anything with which payment is made." (Worcester's Dictionary.) Money, as well known at the time of the formation of the Constitution, and as since known to this court, included "paper money." (4 Peters, 410, 11 ib., 257. Griswold *v.* Hepburn, 2 Duvall, 51.)

V. To a complete understanding of the extent of Congressional authority in this matter, the clauses relating to it should be considered together as a whole, and in the light of their history.

(f). The coining of money, the emission of bills of credit; and the making of legal tender are separate and distinct powers. Under the Articles of Confederation, they were so, the several States retaining power over legal tender. 11 Peters 337. Hildreth's History, 3, 302, 467. Story on Const, § 1365.

Act. of Con. Art. 9, Sec. 6, Stat. at Large, Vol. 1, 8, Johnson v. Hocker 1 Dallas 429; Williamson v. Bacot 1 Bay. 62; Colcock v. Wainright ib. 14. Petrie v. Smith ib. 115; Exr. of Fowle v. Todd ib. 176; Mumford v. Wright, Kirby (Conn.) 297.

(g). Indeed the evil most fresh in memory at the time of the adoption of the Constitution, was in the form of a regulation of the matter of tender by the legislatures of the several States. Story on the Const. § 1371. And authorities *last above.*

(h). Hence, the important prohibitions upon the States, by means of which all power over these matters was *in fact* carried to Congress. The prohibitions are words of quit-claim from the several States to the United States. Thus construed all the words have meaning. Statute of April 2, 1792, and others already cited on the same subject.

The conclusion to be drawn from this examination of all the parts of the Constitution which specifically relate to this subject, is, that the great object of all constitutional provision in relation thereto was the establishment of the power to secure throughout the United States UNIFORMITY OF CURRENCY. Story, § 1372.

To accomplish this object, the Constitution drew from the States all power over the currency and the matter of legal tender into the possession of Congress, making this essential attribute of sovereignty national, which before had been provincial; but laying no new limit upon the methods of its exercise, or the materials upon which it was to operate.

But, it is urged, the people of the United States, when they established this government, knew so vividly the evils which arise from paper money, that they were determined to prohibit its legal existence.

They knew paper money as almost an inevitable incident of a state of war; and not attempting to prohibit that condition, they expressly gave Congress the power to declare war. At the call of Congress, they were willing to face war with all its evils, a deranged currency first and foremost, though not the greatest, among them. Such de-

rangement could not be avoided at all by the adoption of an exclusively metallic currency. Between that and wisely regulated paper money, the choice would rather be, between a permanent debasement and a temporary suspension—a brief postponement of specie payments.

Congress entrusted by the Constitution with the keeping of the national honor, may in like manner, even in the matter of legal ten- U. S. notes, be entrusted with the maintenance of the public credit and national good faith.

THOMAS H. TALBOT.
For the United States.

Dec. 31, 1868.

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